In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-533

JOHN M. LUTTRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a seaman, brought this action under 46 U.S.C. 688 to recover damages for the injury he sustained when he fell while getting out of a lifeboat which was secured on the davits of a United States vessel on which he was employed. The district court, finding that the lifeboat had not suddenly moved when petitioner attempted to climb out of it and that there was a reasonably safe means of exit from the lifeboat, held that the vessel was not unseaworthy and

denied petitioner recovery. The court of appeals affirmed (423 F. 2d 1197), and this Court denied certiorari on November 16, 1970 (400 U.S. 915).

On June 1, 1971, petitioner filed a motion for new trial pursuant to Rule 60(b) Fed. R. Civ. P., alleging that he had newly discovered evidence which had been intentionally withheld by counsel representing the government. The district court denied that motion as well as a subsequent motion for reconsideration (Pet. App. 37-38). The court of appeals dismissed the appeal on the ground that the motion for a new trial was untimely made and that "adherence to the time requirement of Rule 60 does not result in a miscarriage of justice" (Pet. App. 39), and denied petitioner's motion to vacate the dismissal.

Petitioner contends that a fraud has been perpetrated on the court because there was a willful concealment of evidence from him. The alleged new evidence, a Coast Guard inspection notebook, is immaterial;[1] the only reason petitioner did not obtain

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[1] The issue at trial was whether there was a reasonably safe method of leaving the lifeboat. Petitioner relies on this document (1) to identify the type of lifeboat involved in the accident; (2) to show that the injury occurred during a lifeboat drill; and (3) to show that part of the crew did not participate in the drill. But there never was any question as to the identity or type of lifeboat involved in the accident; petitioner's case is not helped if it weighed 3250 pounds rather than 9000 pounds. Moreover, a lifeboat drill is performed first on one side of a ship and then on the other side. Petitioner's own testimony was that at the time of the accident the lifeboat drill had already been completed on his side of the

a copy of it at the trial apparently was that he never asked for it. Both courts below have rejected petitioner's contention that he has demonstrated facts which would entitle him to a new trial. There is nothing warranting further review.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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ship and that he was not participating in the drill when he was injured. Therefore it is irrelevant that the lifeboat drill was in progress on the other side of the ship. Finally, the allegation that part of the crew was not participating in the drill is irrelevant to the issue at trial.

[2] Petitioner's attorney also seeks review of the assessment of costs against him by the district court. This issue was not raised below and accordingly is not properly before this Court. In any event, the district court justifiably concluded that the attorney had conducted so many proceedings in this case as unreasonably to increase costs, and therefore properly required him to pay such excess costs pursuant to 28 U.S.C. 1927.

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